Supreme Court, U.S.
FILED
FEB 18 1993
OFFICE OF THE CLERK

No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL STATES INSURANCE COMPANY,
Petitioner,

v.

IDA NASSEN,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Iowa

---

PETITION FOR A WRIT OF CERTIORARI

WALTER FREEDMAN
1050 Connecticut Ave., N.W.
Suite 825
Washington, D.C. 20036
(202) 457-5100
Counsel for Petitioner

February 18, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the award of punitive damages against National States Insurance Company, the Petitioner, in an amount more than twelve times the amount of the compensatory damages awarded the plaintiff violated Petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding before the Supreme Court of Iowa, the decision of which will be reviewed if this Petition for a Writ of Certiorari is issued, were the following:

1. National States Insurance Company, Petitioner here and defendant below; and

2. Ida Nassen, Respondent here and plaintiff below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
CONCLUSION	7
APPENDICES:	
Appendix A:	
Opinion of the Supreme Court of Iowa	1a
Appendix B:	
Order Denying Petition for Rehearing	15a
Appendix C:	
Opinion of the District Court of Story County, Iowa	16a

TABLE OF AUTHORITIES

Cases	Page
Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909 (1989)	4, 5
Maxey v. Freightliner Corp., 665 F. (2d) 1367 (5th Cir. 1982)	6
Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. ——, 111 S.Ct. 1032 (1991)	4, 5, 6
TXO Production Corp. v. Alliance Resources Corp. et al., No. 92-179, October Term 1992 (U.S. Sup. Ct.)	6
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 29 St. Ct. 220 (1909)	6
Constitutional Provisions	
U.S. Constitution, Amendment XIV	2
U.S. Constitution, Amnedment VIII	5
Other Authorities	
McCormack, *Law of Damages* (1935)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92 - ——

NATIONAL STATES INSURANCE COMPANY,
Petitioner,

v.

IDA NASSEN,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Iowa

---

PETITION FOR A WRIT OF CERTIORARI

National States Insurance Company petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Iowa Supreme Court filed in this proceeding.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa, filed on December 23, 1992, affirming the decision of the District Court, is not reported but is set forth in Appendix A, *infra*, at p. 1a. The order of the Supreme Court of Iowa denying Petitioner's Request for Rehearing, filed on January 22, 1993, appears in Appendix B, *infra*, at p. 15a. The decision of the District Court of Story County, Iowa,

on Petitioners Motion for Judgment Notwithstanding the Verdict and Motion for New Trial and Request for Hearing is also not reported but is set forth in Appendix C, *infra*, at p. 16a.

JURISDICTION

The opinion of the Supreme Court of Iowa was filed on December 23, 1992. Rehearing was denied on January 22, 1993. The jurisdiction of this Court to review the decision of the Supreme Court of Iowa is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides, in so far as relevant here, as follows:

> No State shall . . . deprive any person of life, liberty or property without due process of law. . . .

STATEMENT OF THE CASE

On July 21, 1989, Ida Nassen ("Nassen") filed suit against National States Insurance Company ("National States") in the District Court of Story County, Iowa, for failure to pay a claim filed on her behalf against National States which had earlier issued to Nassen an insurance policy providing for certain nursing care benefits at the rate of $60 per day for a maximm period of 24 months. That Nassen incurred the costs in a qualified nursing care facility for at least 24 months is not in dispute. National States did not, however, honor Nassen's claim for benefits because it concluded, after a careful and lengthy review of the facts, that it had been misled by Nassen's application because it failed to disclose significant material information. National States, therefore, rescinded the policy. The case was heard by a jury beginning March 12, 1991. At the end of the trial the jury entered a special verdict on March 21, 1991, against National States

and awarded Nassen $43,800 for breach of contract, $40,000 for bad faith [1] and $500,000 punitive damages.

On April 1, 1991, National States filed a Motion for Judgment Notwithstanding the Verdict and Motion for New Trial and Request for Rehearing. Insofar as pertinent to this Petition, National States challenged the award of punitive damages alleging that it was excessive, contrary to law and the result of passion and prejudices on the part of the jury. On May 10, 1991, the District Court of Story County denied National States' Motion subject to a remittitur, to which Nassen agreed. (See, footnote 1, *supra.*) On June 4, 1991, National States filed a Notice of Appeal with the Supreme Court of Iowa and Nassen filed a cross-appeal on June 6, 1991.

The appeals were heard by the Supreme Court of Iowa which filed its opinion on December 23, 1992, affirming the decision of the lower court. In that opinion, the Supreme Court of Iowa introduced a significant federal question in the proceeding by ignoring, with respect to the punitive damage issue, the teachings of *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032 (1991) (which had been decided more than a year and one-half earlier) and stating that there was no inflexible mathematical ratio between compensatory damages and punitive damages. (App., *infra*, 13a).

On January 4, 1992, National States filed a Petition for Rehearing with the Supreme Court of Iowa, specifically calling to that Court's attention to its constitu-

---

[1] The jury actually awarded Nassen (plaintiff below) $40,000 for what it regarded as National States bad faith conduct and another $40,000 for fraudulent misrepresentation, but the trial court found that these were "duplicate damages" and directed that a new trial could be avoided if Nassen would agree to a $40,000 reduction in the judgment (App., *infra*, 21a) and she did. The Iowa Supreme Court treated the award as having been made solely because of National States' bad faith in processing the claim (App., *infra*, 10a).

tional error,[2] but the Petition for Rehearing was denied in an order filed January 22, 1992 (App., *infra*, 15a).

REASONS FOR GRANTING THE PETITION

This Petition for a Writ should be granted because, if granted, it will afford the Court an opportunity to address in a meaningful way the question of what parameters are permissible under the Due Process Clause of the Constitution when punitive damages are awarded against a tortfeasor. This Petition presents that issue can be addressed as a naked question unencumbered by other questions.

Punitive damages as a means to penalize, punish and deter have been a part of our jurisprudence since even before the Fourteenth Amendment of our Constitution was adopted. McCormack, *Law of Damages* (1935) § 77, While our courts have widely recognized punitive damages as appropriate in civil cases where the tortfeasor's conduct was found to go beyond mere negligence, there has been, during the past five or six years, an explosive enlargement in the size of punitive damages awarded by juries and accepted by courts of review. Indeed, an award of even 117 times the amount of compensatory damages has been allowed to stand. (*Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909 (1989)). Even as this Petition is being prepared,

---

[2] In the Petition for Rehearing, National States stated, *inter alia*, an inflexible mathematical ratio that focuses on the plaintiffs's "This Court [Supreme Court of Iowa] states in its opinion that injuries rather than the wrongful acts of the defendant, fails to accomplish the policy objectives of punishment and deterrence. [App. *infra*, 13a.] Yet, the Court does not articulate any standard by which to judge the appropriateness of a punitive damage award. The need for such a standard let to the constitutional review of punitive damages by the United States Supreme Court in *Pacific Mutual Life Insurance v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, 113 L. Ed. 1 (No. 89-1279, 1991). There the Court intimated that a ratio of 4:1 between punitive damages and actual damages came close to the line of constitutional impropriety."

the press is reporting a punitive damage award of $105 million in a case where the compensatory damage award was $4.5 million (Washington Post, February 5, 1993, p. 1).

No more do we see in punitive damage awards any rational relationship between the award and the wrongful conduct. But the commands of the Due Process Clause require constraints upon the imposition of punitive damages in civil cases between private litigants, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 280, 109 S.Ct. 2909, 2923 (1989).[3] Less than two years ago, the Court sought to restrict run-away punitive damage awards when it declared, in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032 (1991), that a ratio of 1:4 between compensatory and punitive damages did not "cross the line" into the area of constitutional impropriety but that it "may be close to the line." At p. 1046 of 111 S.Ct. Yet *Haslip* with its two concurring and one dissenting opinions has only served to add to the uncertainty.

The affirmance of a 1:4 ratio still left the law without a standard and so unconscionable punitive damage awards which "jar one's sensibilities" (at p. 1043 of 111 S.Ct.) still proliferate. Indeed, in many cases, the juries appear less concerned with fashioning a "penalize, punish and deter" award than with the "deep pocket" of the defendant. Indeed, in this very case the expert witness for Nassen devoted over half his testimony to the financial practices and resources of the Petitioner.

The Court has demonstrated its concern with the after-effects of the *Haslip* decision by granting a Writ of Cer-

---

[3] The affirmance of the shockingly large punitive award in the *Browning-Ferris* case, *supra*, did not, however, rest on the Due Process clause for the Court said that that issue could not be considered in that matter for it was not properly before the Court; only the Excessive Fine clause of the Eighth Amendment to the Constitution was involved in that case.

tiorari in *TXO Production Corp. v. Alliance Resources Corp. et al.*, No. 92-179, October Term 1992. In that case the Court is being called upon to address the question of whether an award of punitive damages 526 times the compensatory award invades the tortfeasors's due process rights. There is a common issue in this case and in the *TXO Production* case. Ideally, if this Petition for a Writ is granted, the Court should consider the desirability of consolidating this case with the *TXO Production* case for argument.

There is a pressing need for this Court to declare the dimension of the constraints which the Due Process Clause imposes upon the extent of punitive damages in a civil action between private litigants. Surely the kind of multiples we are witnessing in this case—and in other even more egregious ones—transcend permissible limits. Surely, too, there can be no Constitutional sanction for awards which are grossly disproportionate to the severity of a defendant's misconduct. *Maxey v. Freightliner Corp.*, 665 F. (2d) 1367, 1377 (5th Cir. 1982). The Supreme Court has from early days examined legislative-imposed penalties to make certain that they were not so excessive as to amount to a deprivation of property in violation of the Due Process Clause. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S.Ct. 220 (1909). There is even greater need to insure fundamental fairness in cases involving private litigants.

As Justice O'Connor so aptly said in her dissenting opinion the *Haslip* case (beginning at p. 1056 of 111 S.Ct.) it is time to insist that juries have something better to guide them than "standardless discretion" (at p. 1161 of 111 S.Ct.). To which should be added, the seemingly unlimited discretion to apply their personal predilections and prejudices.

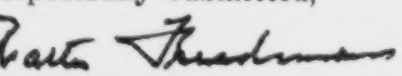
Although punitive damages are awarded in civil cases, insofar as the purpose of punitive damages is to penalize, punish and deter, they have criminal overtones. It is

fitting, therefore, that the Due Process Clause be the touchstone for a ruling which fixes the precise standard which should guide juries in fixing their awards. The failure of the Court to do this earlier has left the law of punitive damages in a chaotic state. It is time for a change and this case presents the Court with an opportunity to bring some orderliness to this important aspect of the law of damages and by judicial prescription reestablish some understandable relationship between punitive and compensatory damages.

CONCLUSION

For all the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



WALTER FREEDMAN
1050 Connecticut Ave., N.W.
Suite 825
Washington, D.C. 20036
(202) 457-5100
Counsel for Petitioner

February 18, 1993

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF IOWA

No. 342/91-880

Filed December 23, 1992

IDA NASSEN,

Appellee,

vs.

NATIONAL STATES INSURANCE COMPANY,

Appellant.

Appeal from the Iowa District Court for Story County, Carl E. Peterson, Judge.

Defendant insurance company appeals from adverse judgment in action alleging that it acted in bad faith in denial of plaintiff's claim under a nursing home insurance policy. AFFIRMED.

Mark D. Sherinian and Thomas D. Hanson of Hanson, Bjork & Russell, Des Moines, for appellant.

Barry J. Nadler of Newbrough, Johnston, Brewer, Maddux & Nadler, Ames, for appellee.

Considered by Larson, P.J., and Schultz, Carter, Lavorato, and Neuman, JJ.

CARTER, J.

Defendant, National States Insurance Company (National States), appeals from an adverse judgment in an action alleging that it had acted in bad faith in its denial of a claim by plaintiff, Ida Nassen, under a policy of nursing home insurance. Plaintiff has cross-appealed

from the district court's order for a remittitur of $40,000 of the verdict, which included actual damages totaling $123,000 and punitive damages of $500,000. After reviewing the arguments presented by the parties, we affirm the district court's judgment in all respects.

In April of 1988, plaintiff, then 85, purchased a nursing home insurance policy from National States. The policy was sold to her by Kenneth Phillips, an independent insurance agent. Phillips filled out the application form after asking plaintiff about her medical history. She told him that she had been hospitalized for three days for a bowel obstruction in November 1987, but had not needed surgery. Plaintiff's application was sent to National States and approved by its underwriter, Dedra Patton. A policy of nursing home insurance was issued to plaintiff on April 28, 1988.

At the time of plaintiff's three-day hospitalization in November 1987, the admitting physician had noted the possibility of confusion and hypothyroidism on her admission form. She was found to have a low thyroid value and was placed on a "very small dose of thyroid" by her regular physician, Dr. Anderson. His tests did not indicate hypothyroidism, and he noted that the plaintiff was not at all confused while under hospital observation. Dr. Anderson testified at the trial that when dictating his medical notes he noted that both the confusion and hypothyroidism diagnoses were unconfirmed.

Plaintiff was hospitalized for five days in June 1988, with uncontrolled diabetes, mild hypothyroidism, and mild dementia. Upon release from the hospital, she was admitted to a nursing home. Irene Crippen, plaintiff's good friend and attorney in fact, submitted a completed and signed claim for nursing home benefits to National States on plaintiff's behalf on July 6, 1988. During the months of August and September Crippen called National States a number of times but did not get a response. On October 3, National States sent Crippen a letter ask-

ing for another signed claim form. They received the form and a letter from Crippen on October 10. On October 21, National States sent Crippen a letter requesting another signed claim form. By that time, Crippen was liquidating plaintiff's assets to pay for her care at the nursing home.

On November 5, Crippen sent the third signed claim form, requested by National States. On November 8, the insurance company sent another letter to Crippen requesting yet another signed claim form. Crippen responded advising the insurance company that she had already sent three completed and signed claim forms and asked if they were giving her the "runaround."

During the last week of January 1989, Crippen again called National States to inquire about plaintiff's claim. The company returned her call the next week and told her that it was still waiting for a doctor's report. That report was sent to National States and received by it on February 7, 1989.

Crippen ultimately contacted attorney Donald Newbrough on plaintiff's behalf. He wrote to National States in March inquiring if they needed more information. In a letter dated March 15, the head of the nursing home division responded that the company was still waiting for Dr. Anderson's report, which the company had in fact received on February 7.

On April 4, 1989, National States wrote to Newbrough informing him that its investigation revealed that the application for the policy was inaccurate and incomplete. The letter stated specifically that her health history relating to chronic confusion and hypothyroidism were not listed and that, had the company known of these conditions, the policy would not have been issued. One of Newbrough's associates sent a letter to National States advising it that Dr. Anderson had furnished a report to the insurance company indicating that plaintiff did not

have chronic confusion or hypothyroidism before the date of her application. National States then returned plaintiff's premium for the policy and purported to rescind the policy retroactive to the date of issuance.

Plaintiff filed this action alleging breach of contract, insurance bad faith, and fraudulent misrepresentation. The jury found for the plaintiff on all counts. They returned a special verdict awarding damages of $43,800 for breach of contract, $40,000 for bad faith, $40,000 for fraudulent misrepresentation, and $500,000 in punitive damages.

On the punitive damage verdict, the jury found that National States had acted in willful or wanton disregard for plaintiff's rights but that its conduct was not directed specifically at her. This relegated the bulk of that award to the civil reparations fund pursuant to Iowa Code section 668A.1(2)(b) (1991). In response to posttrial motions filed by National States, the district court ultimately ordered a remittiur of the $40,000 verdict on the fraud claim. Plaintiff accepted the remittitur. Other facts that bear on the issues presented will be discussed in our consideration of the legal arguments of the parties.

I. *Admissibility of Testimony of Witness, Marshall Reavis.*

First among National States' claims of error is a challenge to the opinion testimony of plaintiff's expert witness, Marshall Reavis, indicating that National States was engaging in "cash flow underwriting" and "post-claim underwriting." This witness, who had a Ph.D. in insurance risk management, had reviewed data on National States contained in a nationally recognized insurance industry rating service.[1] Comparisons had been

[1] This witness was age 58 at the time of trial and had received a Ph.D. in insurance risk management from the University of

made of National States' premiums and those of other insurance companies selling nursing home policies with allegedly similar coverages. In addition, this witness had studied the company's underwriting and claims management practices as shown in company manuals and memorandums and had reviewed deposition testimony of key National States' employees concerning those practices.

After reviewing all of those materials, Mr. Reavis concluded that the company's practices reflected a broad plan to run large amounts of cash through the company that could be invested and ultimately paid out to the company's principals prior to its collapse from an unreasonably low premium structure. He labeled this practice as "cash flow underwriting." Mr. Reavis expressed the view that the premium charged by National States for its nursing home insurance was less than a third of that charged by other companies for similar coverage.

In reviewing National States' underwriting practices, Mr. Reavis concluded that its quotas for underwriters amounted to reviewing eighty-five applications per day. He concluded that this would necessarily result in the rubber-stamping of policy applications with no serious effort to weed out high-risk applicants. The witness opined that there was virtually no chance the premiums charged by National States would be adequate to cover its claims and administrative costs on the policies sold. This factor, coupled with the company's seemingly deliberate delay in processing claims, led the witness to conclude that the company was applying "postclaim underwriting." He described "postclaim underwriting" as an attempt to rescind policies after claims have been made.

Georgia in 1975. Prior to that time, he had worked in the field of insurance underwriting for 17 years. His postdoctorate activities have included teaching at De Paul University, Eastern Kentucky University, and the University of Illinois. His specific research areas have included fraudulent practices by insurance underwriters.

National States' principal objection to this testimony was based on Iowa Rule of Evidence 406, which provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

National States argues that Mr. Reavis failed to consider a sufficient number of claims that it had denied to warrant admission of evirence of routine practice under rule 406.

We do not believe that the admissibility of the challenged evidence is governed by rule 406. That rule relates to evidence of routine practice for purposes of permitting a fact finder to conclude that conduct in a particular instance was in conformity with that practice. Plaintiff did not offer the challenged evidence for this purpose. She offered it, rather, as data upon which this expert witness might formulate his opinions concerning the company's insurance underwriting practices.

Rule 406 does not affect those rules of evidence that govern expert opinion testimony. Iowa Rule of Evidence 702 allows the admission of expert opinions if such opinions will assist the trier of fact in understanding the evidence or in determining certain factual issues. Rule 703 governs the bases upon which an expert opinion may be premised. It provides:

> The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

This court has long been committed to a liberal view that allows opinion testimony if it will aid the jury and is based on special training, experience, and knowledge with respect to the issue in question. *Cook v. State*, 476 N.W.2d 617, 620 (Iowa 1991); *Mermigis v. Servicemaster Indus., Inc.*, 437 N.W.2d 242, 247 (Iowa 1989).

The qualifications of Mr. Reavis appear to have been adequate to allow him to testify to the matters that were the subject of National States' objections. The topic for expert opinion involved allegedly fraudulent underwriting techniques by insurance companies. Plaintiff's expert was shown to be an authority on that subject through education, background, and experience. We are unable to accept National States' suggestion that only an actuary would be qualified to give a valid opinion on the company's underwriting practice.

Probably the most damaging argument that National States makes in challenging Mr. Reavis's testimony is that the benefit structure of those insurance companies used in his premium comparisons were somewhat more generous than the benefits under National States' policies. We conclude, however, that this disparity only affects the weight of the testimony and not its admissibility.

In objecting to the questions propounded to Mr. Reavis, National States did not assert that the factors upon which his opinions were based were not of a type reasonably relied upon by experts in the field. Applying the standards of rule 702 and rule 703, we do not believe that the district court abused its broad discretion in admitting this testimony.

II. *Sufficiency of the Evidence on the Bad-Faith Claim.*

National States urges that the trial court erred in failing to grant its motion for a directed verdict on the bad-faith claim. In support of this contention, it argues that the legal efficacy of its attempted rescission of plain-

tiff's policy was "fairly debatable" and thus not actionable under the standard this court adopted in *Dolan v. AID Insurance Co.*, 431 N.W.2d 790, 794 (Iowa 1988).

The reason articulated by National States for denying plaintiff's claim and for its attempted rescission of her policy was the failure on her part to disclose two pre-existing health conditions on the insurance application. The basis for this contention was a diagnosis contained on a hospital record of November 10, 1987, which was furnished to National States as part of plaintiff's claim. That diagnosis indicated "confusion" and "hypothyroidism." A reading of the physician's discharge summary for that hospitalization (a document also furnished to National States as part of plaintiff's claim) would have revealed that these conditions were suspected diagnoses at the time of plaintiff's admission, but were not confirmed during her stay in the hospital.

Clearly, National States had no basis for contending that plaintiff had intentionally misrepresented vital health information on her insurance application. However, in considering the merit of National States' motion for directed verdict, we will assume that any material misrepresentation of preexisting health conditions on the application would have justified rescission even if made unintentionally.

The "fairly debatable" test approved in *Dolan* required plaintiff to establish to the satisfaction of a reasonable fact finder that National States' decision to rescind her policy was not based on an honest and informed judgment. National States based its decision on a single reference found among several pages of hospital records. Any question concerning the validity of the references to "confusion" and "hypothyroidism" contained in the November 10, 1987 hospital record could have been cleared up by a reading of the company's own claim file. National States ignored crucial information in that file and shunned any information that plaintiff's representatives

sought to provide on this question. Under the circumstances, the question of bad faith was for the jury to decide.

III. *The Fraud Claim.*

National States also questions the sufficiency of the evidence on plaintff's fraud claim. As we have indicated, the district court ordered a remittitur of all damages separately assessed under that theory. Unless we sustain plaintiff's cross-appeal challenging that action or act to reinstate that portion of the verdict under Iowa Rule of Civil Procedure 250, there is no need to decide the issues on appeal relating to the fraud claim. Consequently, we deem it expedient to consider plaintiff's cross-appeal at this juncture.

The jury assessed $40,000 in actual damages on the bad-faith tort claim and another $40,000 on the fraud claim. The trial court believed the fraud verdict to be a complete duplication of the damages awarded for bad faith. In her argument on cross-appeal, plaintiff concedes that $13,000 of the fraud verdict duplicated the damages recovered under the bad-faith tort claim. She urges, however, that $27,000 of the fraud award could have been based on elements of damage not included in the bad-faith award.

Plaintiff's argument is based on the premise that under the evidence the entire $40,000 awarded on the bad-faith claim could have been for emotional distress. She asserts that, because the record would also support economic damages of $27,000, the jury could legitimately have included that amount in the verdict on the fraud claim.

Plaintiff is correct in contending that, under the trial court's instructions, the jury was permitted to award certain economic damages under the bad-faith claim and

the fraud claim, which were not available under the breach-of-contract claim. The instructions also permitted recovery for emotional distress damages under both the bad-faith claim and the fraud claim. We believe plaintiff's argument ultimately falls, however, because the acts constituting bad faith and the acts constituting fraud would have produced identical consequences. There was thus no logical way under the instructions that the jury could have found emotional injury resulted from the bad faith but not from the fraud, or, that economic losses resulted from the fraud but not the bad faith. The district court was correct in concluding that these verdicts completely duplicated each other.[2] Because of the action taken by the trial court, we need not consider National States' challenges to the fraud claim on the merits.

IV. *Sufficiency of Evidence to Support Award of Actual Damages.*

National States does not challenge the $43,800 actual damage award on the breach-of-contract claim. It does urge that the evidence is insufficient to support the additional damages awarded for bad faith and for fraud. Because we have confirmed the trial court actions in setting aside the fraud damages, we consider only the bad-faith claim.

---

[2] It is necessary, however, to consider the effect of Iowa Rule of Civil Procedure 250 on the remittitur of the fraud damages. That rule provides that, when a conditional new trial has been avoided by one party's acceptance of the condition and the other party appeals, the original judgment is reinstated. Although the district court chose to handle the problem involving duplication of damages by an order for remittitur, we do not believe this is truly a rule 250 situation. That is because in the present case the fraud damages totally duplicated the damages awarded on the bad-faith claim and thus National States was entitled to have that verdict set aside without regard to any conditional grant of a new trial. As a result, we decline to apply rule 250 in the present case.

On the bad-faith claim, the trial court's instructions allowed the jury to award damages for emotional distress and for economic loss resulting from premature dissipation of plaintiff's assets. National States concedes that plaintiff's evidence was sufficient to establish *some* economic loss for premature asset dissipation. It urges, however, that the amount of that economic loss was sufficiently small that a reasonable award for emotional damages could not have raised the total damage award to $40,000.

Although the verdict is high, we conclude that it is not without evidentiary support nor is it a product of passion or prejudice. Even if we assume, as National States suggests, that the maximum award for the economic losses permitted under court's instructions was less than $10,000, the jury could have reasonably based the balance of the award on emotional distress.

Plaintiff's closest friend who shepherded her claim through the insurance company and assisted her in obtaining an attorney testified as follows:

> Q. When Ida first went in, did you discuss with her the facts that her money was being used, you had to use up her money to pay for the nursing home? A. She understood that when she went in there, yes.
>
> Q. Did you talk about—Did she mention to you that she had this nursing home policy? Did she understand that? A. Oh, yes, she did understand that.
>
> Q. Did you tell her that the insurance company wasn't providing funds to pay for the nursing home care? A. Not when she first went in because I didn't know that.
>
> Q. Okay. Subsequently, to that time, did you tell her that? A. Once in a while she would ask me—asked me about her bank account, and how much money she had, and she said, well, we don't have to pay it, the insurance is paying it, so.

Q. And when you discuss the fact that the insurance company wasn't paying it, was she upset about that? A. Yes, she really was.

Q. Would you just describe that to the jury, please. A. Well, she was concerned because she was spending her own money.

Q. Did she realize she didn't have a lot of money to. A. Yes she did.

Q. —to pay for the nursing home care? So she knew she wasn't getting the benefits? A. Yes, she knew that.

. . . .

Q. And one of the issues that the jury may be confronted with is what type of understanding she had of this and what I want to know is, how long would she have been upset or recognize the fact that she wasn't receiving the funds from the insurance company? A. Well, at times, even now, she will say when I have to, you know, take her to see the doctor, take her some place for her eyes, she will say, well, who's paying for this? Do I have to pay for this? How much money do we have? Is the insurance paying it? She will ask me these things just for a period of time.

Q. And can you tell us how long she would have comprehended the fact that the company was not paying the premium—of not paying the $60.00 per day on the nursing home insurance? A. I think she understood that pretty much up to the time [in November 1988] when she was ill with the cancer.

It is, of course, difficult to arrive at a sum of money that fairly compensates for the trauma viisted upon elderly persons by having their worldly possessions dissipated by extended care costs that they believe should be covered by insurance. We are convinced, however, that this is a situation capable of producing severe mental suffering. We conclude that the evidence was sufficient to support the damages awarded.

V. *The Punitive Damage Award.*

Finally, we consider National States' challenge to the jury's award of punitive damages. It asserts that the district court's instructions on punitive damages were inadequate and that the amount of the award was excessive.

National States' objection to the jury instructions involved the refusal of the trial court to give its requested instructions, which would have contrasted malicious acts with acts that are merely negligent. Plaintiff's claims of bad faith and fraud were based on the theory that the company was engaging in a general scheme to induce elderly persons to purchase insurance that was not intended by the company to provide the benefits expected. We do not believe that the jury was likely to confuse malicious conduct, as described in the instructions that were given by the trial court, with mere negligence. Moreover, we are persuaded that, once the jury found that a bad-faith tort had been committed under the instructions that were given concerning that cause of action, the elements required for an award of punitive damages had been confirmed. We find no error in the refusal to give the requested instruction.

With respect to National States' challenge to the amount of the punitive damage award, this court has reviewed the criteria for reviewing such awards in *Johnston v. Norfolk Southern Corp.*, 448 N.W.2d 446 (Iowa 1989), and *Ryan v. Arneson*, 422 N.W.2d 491 (Iowa 1988). We concluded in those decisions that an inflexible mathematical ratio that focuses on the plaintiff's injuries rather than the wrongful acts of the defendant fails to accomplish the policy objectives of punishment and deterrence. *Ryan*, 422 N.W.2d at 496. Punitive damages exist to punish the particular defendant and to deter the offending party and like-minded individuals from committing similar acts. *Id.*; *Pringle Tax Serv., Inc. v. Knoblauch*, 282 N.W.2d 151, 154 (Iowa 1979).

In the present case, the jury could have found that the defendant insurance company had been engaging in a calculated scheme to sell insurance to elderly people by means of underwriting practices that would ultimately render the company unable to pay the promised benefits. Although National States urges that the jury award of punitive damages represented forty-five percent of the company's net income for a single year, that suggestion is posited upon the company's unaudited determination of net operating income. The company also enjoyed several million dollars in investment income during the time this scheme was in effect. During this time, more than $5,000,000 in dividend income was being paid to company principals. The jury could have determined that a substantial award of punitive damages was necessary to deter the offending conduct. We will not alter the jury's award.

VI. *Interest on the Award of Punitive Damages.*

As a final matter, we consider plaintiff's additional argument on cross-appeal that interest on the punitive damage award should run from the date upon which her petition was filed. To adopt that position would require us to overrule our decision in *Midwest Management Corp. v. Stephens*, 353 N.W.2d 76, 82 (Iowa 1984). Several sessions of the legislature have convened since our decision in *Midwest Management* interpreting the effect of Iowa Code section 535.3 on punitive damage awards. No action has been taken by the legislature to establish a different rule for paying interest on punitive damage awards. Consequently, we decline to overrule *Midwest Management* on this question.

We have considered all issues presented and find no basis for disturbing the judgment of the district court. That judgment is affirmed.

AFFIRMED.

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 91-880

IDA NASSEN,

Appellee,

vs.

NATIONAL STATES INSURANCE COMPANY,

Appellant.

ORDER

After consideration by the court, en banc, appellant's Petition for Rehearing in the above-captioned case is hereby overruled and denied.

Dated this 22nd day of January, 1993.

THE SUPREME COURT OF IOWA

/s/ Arthur A. McGiverin
ARTHUR A. MCGIVERIN
Chief Justice

APPENDIX C

IN THE IOWA DISTRICT COURT
FOR STORY COUNTY

Cause No. 33838-0789

IDA NASSEN,

Plaintiff,

vs.

NATIONAL STATES INSURANCE COMPANY,

Defendant.

ORDER

[Filed May 10, 1991]

The Defendant has filed a Motion for Judgment Notwithstanding the Verdict, a Motion for New Trial, and Request for Hearing thereon. The matter comes on for Hearing. The movant appears by counsel, John L. McKinney and Mark D. Sherinian. The Plaintiff appears by counsel, Barry J. Nadler. The State Court Administrator, as Administrator of the Civil Reparations Trust Fund, appears by Special Assistant Attorney General Craig Kelinson.

The matter comes on for Hearing.

The Motion for Judgment Notwithstanding the Verdict does not refer to the specific provisions of the Rule claimed to be applicable, but it is apparent from the content of the Motion that the claim for a right to a judgment notwithstanding the verdict is based on provision (b) of the Rule. The Court, therefore, first considers the Motion for New Trial filed by the Defendant.

The Defendant initially complains that the Court committed an error of law by refusing to submit the affirmative defense of fraudulent misrepresentation on behalf of the Plaintiff to the jury warranting a new trial under R.C.P. 244. The Defendant had the burden of proof on its claim of fraudulent misrepresentation as a basis for rescission. *Ley v. Metropolitan Life Insurance Co.*, 94 N.W. 568 (Iowa 1903).

National States relied on two claimed misrepresentations as a basis for rescission: (a) failure of the Plaintiff to reveal the conditions of hypothyroidism on the application; (b) failure of the Plaintiff to reveal the condition of confusion on the application.

There was no evidence of any kind that Ida had hypothyroidism at the time of the signing of the application. It was further uncontradicted that hypothyroidism was not material to the issuance of a policy.

The testimony, viewing it most favorable to the Plaintiff, failed to produce any evidence that Ida Nassen knew that she was suffering from a medical condition of "confusion" at the time of the making of the application, nor was there any record to support a conclusion that the form application provided in a manner that she was to supply this information, even if she knew it.

There was not a scintilla of evidence to support Ida Nassen's knowledge of any condition of "confusion" at the time of the application. A certification on the application by the Plaintiff was that the information provided was to the best of her knowledge.

When there is no evidence to support a claim, the matter should not be submitted to the jury.

The Defendant contends that the verdict of the jury on the claim of bad faith was excessive. The standard for a review of a damage award is set forth in *Harsha v. State Savings Bank*, 346 N.W.2d 791, 799 (Iowa 1984).

The verdict cannot be set aside unless one of the following factors is established:

> "That the verdict is so (1) flagrantly excessive or inadequate; or (2) so out of reason as to shock the conscience of the Court; or (3) the result of passion or prejudice; or (4) lacking in evidentiary support."

The evidence must be viewed in the light most favorable to the Plaintiff. *Sallis v. Lamansky*, 420 N.W.2d 795, 799 (Iowa 1988). It is uniquely within the discretion of the jury to draw conclusions concerning the amount of damages for mental pain and suffering. They cannot be calculated by any exact method. *Schnebly v. Baker*, 217 N.W.2d 708, 725 (Iowa 1974). The Court cannot say in this factual scenario that the verdict was a result of passion or prejudice, or one which shocks the conscience of the Court. It is substantially supported by the record in these proceedings.

Defendant complains that the Court should have ruled, as a matter of law, that there was a debatable issue on the Plaintiff's claim to the insurance company, and therefore, the Defendant could not be found liable for bad faith. The Defendant contends the matter should not have been submitted to the Court, and thus the case warrants a new trial. The Court made the threshold determination that a reasonable fact finder could find that National States Insurance Company failed to "exercise an honest and informed judgment" on the claim and could conclude that its denial was not fairly debatable. The issue is, therefore, one for the jury, not for the Court, as a matter of law. *Kiner v. Reliance Insurance Company*, 463 N.W.2d 9 (Iowa 1990). The Court instructed the jury concerning the definition of a "fairly debatable" issue, and the jury determined there was not a fairly debatable issue. The record supported that conclusion.

The Defendant contends that the punitive damage award is erroneous because it was excessive and was

made as a result of passion and prejudice. Defendant further contends there was not an adequate showing of actual, legal malice on the part of the Defendant to justify submitting the issue of punitive damages to the jury. The Defendant further contends that the Court should have defined legal malice, actual malice, and negligence as requested by the Defendant in the requested jury instructions.

The punitive damage award is substantial. Ordinarily, the amount assessed for punitive damages is "peculiarly within the discretion of the trier of fact". *Grefe v. Ross*, 231 N.W.2d 863, 868 (Iowa 1975). The Court is satisfied that the punitive verdict is not excessive, nor a result of passion or prejudice.

Without reciting all of the evidentiary support for the justification of submitting the claim of punitive damages to the jury, the Court is satisfied, from the evidence, that there is a jury issue created by the evidence to submit the issue of punitive damages to the jury.

While the term actual malice or legal malice is not utilized in the instruction of the Court to the jury, the description of those legal terms is set forth in the instruction. The Defendant complains that the definition of negligence was not contained in the instruction on punitive damages. The Court concludes that it is not necessary to define what a claim is not. It is appropriate to define the elements that support the basis for a claim, and the Court did so in the instructions. The instruction is correct, as submitted.

The Defendant complains that the Court committed an error of law to allow the testimony of expert witness Dr. Marshall Reavis and the admission of certain business practice evidence.

The Defendant did not object to the testimony concerning the routine business practice evidence submitted by several witnesses on behalf of the Plaintiff, and thus

any error is waived. *Dutcher v. Lewis*, 221 N.W.2d 755, 758 (Iowa 1974). The admissibility of such evidence is within the discretion of the trial court, even if objection had been lodged. *Kunkle Water & Electric v. City of Prescott*, 347 N.W.2d 648, 653 (Iowa 1984).

The Court held extensive hearing outside of the presence of the jury to determine whether the proferred opinions of Dr. Reavis would meet the requirements of admissibility. The expert testified to his knowledge of general marketing, underwriting, and claims handling of the Defendant, and described how the procedures affected the case of Ida Nassen. The Court made it clear in the voir dire of this witness that it was examining the testimony to determnie whether or not the testimony could focus on the particular claim in question. After hearing the proffer, the Court was satisfied that the evidence would aid the jury on the particular claim, and concluded that the testimony would be admissible and evaluated on the basis of the weight thereof rather than be excluded. It is within the Court's discretion to determine if the opinion testimony is of the nature which will aid the jury and is based on special training, experience, or knowledge with respect to an issue in question. *Sallis v. Lamansky*, 420 N.W.2d 795, 797 (Iowa 1988). No error occurred in the admission of this testimony.

The Defendant contends that the Court failed to exclude certain testimony because the evidence goes to alleged unfair practices as outlined in Chapter 507B.4(9) of the Code of Iowa and was not available as a private claim by the Plaintiff.

The Court heard a Motion to Dismiss on this issue prior to the commencement of trial, and reaffirms the Ruling and the conclusions contained therein dated March 11, 1991.

The Defendant further contends that the claim of fraudulent misrepresentation was not supported by the evidence and was excessive. The Court is satisfied that the

record supports the verdict on the fraudulent misrepresentation claim. It does not shock the conscience of the Court, nor does it appear to have been the result of passion or prejudice.

The Defendant complains that the verdict on bad faith claim and the false misrepresentation claim is duplicitous, and should be set aside.

The Plaintiff acknowledges that the record is inadequate to support separate verdicts of $40,000.00 on the bad faith claim and on the false misrepresentation claim since a substantial part of the damages on each of these claim[s] would be the same. The Defendant asserts in response to the Motion for New Trial that it would be willing to accept a remittitur of $15,000.00 on the fraudulent misrepresentation claim. The elements which make up the damages on a bad faith claim and the elements which make up the damages on a fraudulent misrepresentation claim are essentially equivalent. The jury assessed $40,000.00 on the bad faith claim and $40,000.00 on the fraudulent misrepresentation claim. These damages are duplicate damages. This is the only portion of the total damages that is inappropriate. Rule 244(d) and (e) allows for a new trial if the damages are incorrect. The new trial can be limited to the issue of damages in connection with the fraudulent misrepresentation claim and the bad faith claim. In avoidance of the necessity for a new trial, the Court determines that the Plaintiff should be permitted to agree to a reduction of the judgment entered herein by the amount of $40,000.00.

IT IS HEREWITH ORDERED:

The Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial be and it is herewith denied, except a conditional new trial be and it is herewith Ordered in the above-entitled proceedings limited to the issue of damages on the fraudulent misrepresentation claim and the bad faith claim of the Plaintiff in

these proceedings. The Plaintiff may avoid a new trial by agreeing in writing filed in these proceedings, within fifteen (15) days of this Order, to reduce the judgment entered herein by $40,000.00, which shall then be shown of record and a judgment entered accordingly.

In the event the Plaintiff does not agree to such terms within the time herein specified, the Court will Order a new trial as limited herein.

Dated this 9th day of May, 1991.

/s/ Carl E. Peterson
CARL E. PETERSON
Judge
Second Judicial District

No. 92-1378

In The

Supreme Court of the United States

October Term, 1992

NATIONAL STATES INSURANCE COMPANY,

Petitioner,

vs.

IDA NASSEN,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

BARRY J. NADLER
Counsel of Record
NEWBROUGH, JOHNSTON, BREWER, MADDUX & NADLER
Attorneys for Respondent
612 Kellogg Avenue
Ames, Iowa 50010
(515) 232-1761

3425
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

TABLE OF CONTENTS

Page

Table of Authorities i

Statement of the Case 1

Reasons for Denying the Writ 5

Summary of Argument 5

I. This Court has no jurisdiction because the Petitioner failed to timely raise the due process argument in its appeal before the Iowa Supreme Court 5

II. A decision in this case by the Court will provide no further guidance on the issue of the due process limitation on punitive damages. 7

III. The payment by National States of the judgment to a party that cannot repay it has made this matter moot. 8

Conclusion 9

TABLE OF AUTHORITIES

Cases Cited:

Hanson v. Denckla, 357 U.S. 235 (1958) 6

Heitmuller v. Stokes, 256 U.S. 360 (1920) 9

Herndon v. Georgia, 295 U.S. 441 (1935) 6

Contents

Page

Marin v. England, 385 U.S. 99 (1966) 9

McBroom v. State, 226 N.W. 2d 41 (Iowa 1975) 6

Osborne v. Iowa Natural Res. Council, 336 N.W. 2d 745 (Iowa 1983) 6

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. __, 111 S. Ct. 1032 (1991) 7, 8

TXO Production Corp. v. Alliance Resources Corp., et al., No. 92-179, October Term 1992 8

Webb v. Webb, 451 U.S. 493 (1981) 6

Statute Cited:

28 U.S.C. § 1257(a) 6

APPENDIX

Appendix A – Relevant Portions of Petitioner's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial 1a

Appendix B – Relevant Portions of Petitioner's Iowa Supreme Court Brief in Which Punitive Damages Are Discussed 6a

No. 92-1378

In The

Supreme Court of the United States

October Term, 1992

NATIONAL STATES INSURANCE COMPANY,

Petitioner,

vs.

IDA NASSEN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Ida Nassen, respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the Iowa Supreme Court's opinion rendered on December 23, 1992.

STATEMENT OF THE CASE

On July 21, 1989, Ida Nassen filed suit against National States Insurance Company ("National States") for breach of contract, bad faith and fraudulent misrepresentation in relation to the issuance of a nursing home insurance policy to her and the subsequent non-payment of those benefits. In April of 1988, Ida Nassen, then 85, purchased a nursing home policy from National

States (Pet. App. 2a). The policy was sold to her by an independent agent, Ken Phillips, who filled out the application form for her by asking Ida certain questions about her medical history. *Id.* Ida Nassen properly and truthfully answered all the health care questions. *Id.* The policy was subsequently issued on April 28, 1988. *Id.*

In June, 1988, Ida Nassen was placed in a nursing home because of uncontrolled diabetes, mild hypothyroidism and mild dementia. *Id.* Irene Crippen, Ida's good friend and attorney-in-fact, submitted a properly completed and signed claim form for nursing home benefits to National States on July 6, 1988. *Id.* Irene Crippen called National States a number of times in August and September, but National States failed to return the phone calls. *Id.* Three months after receiving the claim, National States sent a letter to Mrs. Crippen asking for another signed claim form, which the company received on October 10 (Pet. App. 2a-3a). On October 21, National States sent another letter asking for another signed claim form (Pet. App. 3a). By this time, Irene Crippen was liquidating Ida's assets to pay for her care at the nursing home. *Id.*

On November 5, Irene Crippen sent the third signed claim form requested by National States. *Id.* On November 8, the insurance company sent another letter to Irene Crippen requesting yet another signed claim form. *Id.* Mrs. Crippen responded advising the insurance company that she had already sent three completed and signed claim forms and asked if they were giving her the "runaround." *Id.*

In late January of 1989, five months after the initial claim for benefits was properly filed with National States, Mrs. Crippen again called the company to inquire about Ida's claim. The company returned the call a week later and told her that they were waiting for the doctor's report. *Id.* The report was sent to National States and received by it on February 7, 1989. *Id.* When an attorney

hired by Mrs. Crippen inquired about Ida's claim in March, the head of the nursing home division advised that the company was still waiting for the doctor's report which they had already received a month earlier. *Id.*

On April 4, 1989, after delaying action on the claim for nine months, the company rescinded the policy based on a claim that the application form was inaccurate and incomplete as to chronic confusion and hypothyroidism. *Id.* The law firm retained by Mrs. Crippen pointed out to the insurance company that Dr. Anderson, her treating physician, had sent a report to National States indicating that Ida did not have the chronic confusion and hypothyroidism before the date of her application. *Id.* Regardless, National States then returned Ida Nassen's premium and purported to rescind the policy retroactive to the date of issuance (Pet. App. 4a).

Dr. Marshall Reavis, a professor of insurance, who specializes in fraudulent practices of insurance companies, studied the company's premium structure, underwriting practices, and claim handling procedures as described by National States personnel (Pet. App. 4a-5a). Dr. Reavis concluded that the company's practices reflected a broad plan to run large amounts of cash through the company that could be invested and ultimately paid out to the company's principals prior to the collapse (Pet. App. 5a). The practice is called "cash flow underwriting." *Id.*

The premium charged by National States is less than a third of that charged by other companies. *Id.* Dr. Reavis testified that the premium had virtually no chance of being sufficient to pay the claims and administrative costs on the policies sold. *Id.* This factor, in conjunction with the company's deliberate delay in processing claims, led Dr. Reavis to conclude that the company was applying "post-claim underwriting." *Id.* He described "post-claim underwriting" as an attempt to rescind policies after claims had been made to the insurers. *Id.*

After the trial, the jury returned a verdict for the Respondent on the claim of breach of conduct, bad faith and fraudulent misrepresentation. The jury awarded $43,800.00 for breach of contract; $40,000.00 for bad faith and fraud;[1] and $500,000.00 in punitive damages. National States filed a motion for judgment notwithstanding the verdict and a motion for new trial (Res. App. 1a-5a). National States did not claim that the punitive damage award violated their due process rights under the Constitution of the United States. *Id.* The objections to the punitive damage award were that the jury instructions were incomplete, the evidence inadequate, and the verdict excessive as being a result of passion and prejudice (Pet. App. 18a-19a). The trial court Judge determined that none of the arguments of National States had any merit. *Id.*

National States then appealed to the Iowa Supreme Court on June 4, 1991. National States once again did not raise a constitutional claim in its brief that the punitive damages violated its due process rights (Res. App. 6a-10a). The only issues raised by National States about the punitive damage award were that the jury instructions should have included a definition of negligence for comparative purposes and that the verdict was excessive based on state law standards of review (Res. App. 6a-10a). The Iowa Supreme Court analyzed the reward under the same standard it had used for many years. National States argued those standards where applicable and should be applied to the verdict (Res. App. 9a-10a). The Iowa Supreme Court affirmed the trial court's verdict in its opinion of December 23, 1992.

---

1. The jury actually awarded Nassen $40,000.00 for bad faith and $40,000.00 for fraud, but the trial court found that the damages were duplicative and reduced the verdict by $40,000.00 (Pet. App. 21a). The Iowa Supreme Court approved this reduction treating the award as being fully supported by the bad faith claim (Pet. App. 10a). The Iowa Supreme Court, however, never ruled that the fraud claim was not supported by the evidence at trial. *Id.*

On January 4, 1992, National States filed a Petition for Rehearing in the Iowa Supreme Court. In the Petition for Rehearing, for the first time, National States argued that its due process rights had been violated by the punitive damages award. The Iowa Supreme Court denied the Petition for Rehearing en banc without opinion (Pet. App. 15a).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The writ should be denied. The Petitioner has failed to properly raise the due process issue before the Iowa Supreme Court that is now presented in its Petition for Writ of Certiorari. The decision below does not conflict with any decision of this Court and a decision in this case would provide no additional guidance as to the parameters of the due process clause of the Constitution beyond the decision recently issued by this Court. In addition, the issue is now moot since National States has paid the judgment to a party that will be unable to fully pay it back.

I.

THIS COURT HAS NO JURISDICTION BECAUSE THE PETITIONER FAILED TO TIMELY RAISE THE DUE PROCESS ARGUMENT IN ITS APPEAL BEFORE THE IOWA SUPREME COURT.

National States failed to raise its due process claim before the trial court or the Iowa Supreme Court (Res. App. 1a-10a). There was no mention of a constitutional issue in the trial court's decision on National State's motion for judgment notwithstanding the verdict and new trial. (Pet. App. 16a-21a). The Iowa Supreme Court also did not mention any constitutional issue in its decision (Pet App. 1a-14a). Failure to raise the constitutional argument in its

post-trial motions and in its Brief before the Iowa Supreme Court constituted a waiver of that issue in Iowa. *Osborn v. Iowa Natural Res. Council*, 336 N.W.2d 745, 747 (Iowa 1983); *McBroom v. State*, 226 N.W.2d 41, 47 (Iowa 1975).

The issue was first raised by National State in its Petition for Rehearing which was denied without decision (Pet App. 15a). Petitioner admits as much in its Brief in support of its petition. There was no decision by the Iowa Supreme Court on the issue raised by National States' Petition for Writ of Certiorari because National States failed to raise the issue in a timely manner.

28 U.S.C. § 1257(a) requires that Petitioners specifically claim in the lower appellate court the constitutional right it now seeks to have the Court enforce. It has long been the position of this Court that it will not, in reviewing a judgment of the state's highest Court, review a constitutional claim that was first raised in a motion for rehearing which the state court denied without opinion. *Webb v. Webb*, 451 U.S. 493, 496-497 (1981); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). When a state court has failed to pass on the federal question, it is assumed that the omission was due to the failure of the Petitioner to properly present the issue. *Webb v. Webb*, 451 U.S. 493, 495 (1981). In *Herndon*, the Court stated that:

> The long established rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the Court actually entertains the question and decides it.

Herndon v. Georgia, 295 U.S. 441, 443 (1935). There was no such decision in this case on the application for rehearing and there is no jurisdiction under 28 U.S.C. § 1257(a) for a writ of certiorari.

Petitioner appears to claim that it was surprised when the Iowa Supreme Court supposedly introduced the federal question in its decision by ignoring *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032 (1991) and by stating that there was no inflexible mathematical ratio between compensatory damages and punitive damages. In Petitioner's Brief before the Iowa Supreme Court, however, the Petitioner cited in support of its argument the very proposition it now disclaims (Res. App. 9a). Furthermore, the Petitioner failed to cite *Haslip* in its Brief before the Iowa Supreme Court or make a due process argument, even though *Haslip* was decided at least eight months before Petitioner's Brief was filed with the Iowa Supreme Court. In addition, the argument of surprise has no merit since the issue of a due process limitation on punitive damages is not a new one and has been the subject of constitutional litigation for several decades. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, ___, 111 S. Ct. 1032, 1038-1040 (1991). There is no excuse for Petitioner to have failed to properly raise the constitutional issue before the Iowa Supreme Court and the Petitioner's failure to raise that claim denies this Court jurisdiction.

II.

A DECISION IN THIS CASE BY THE COURT WILL PROVIDE NO FURTHER GUIDANCE ON THE ISSUE OF THE DUE PROCESS LIMITATION ON PUNITIVE DAMAGES.

Petitioner argues that this case affords the Court the opportunity to address in a meaningful way the due process parameters for punitive damages. A decision in this case will do no more to set out those parameters then the Court has already set out in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032 (1991). In *Haslip*, the Court affirmed a case that involved a 1:4 ratio as not "jarring one's sensibilities." *Pacific Mut. Life Ins. Co.*

v. Haslip, 499 U.S. ___, ___, 111 S. Ct. 1032, 1043 (1991). The actual damages awarded in this case and approved by the lower court was $88,000.00. The punitive damage award was $500,000.00. This is a little over a 1:5 ratio which is not significantly different than the one analyzed by the *Haslip* Court.

In addition, the facts of this case justify such a punitive damage award. The case involves the outrageous situation of a nursing home insurance company entering into a broad based scheme to defraud elderly people in this country by selling nursing home insurance and then rescinding the policies when a claim is made. The principals of the company had removed over $500,000.00 in cash in the last two years as part of this scheme. This case does not jar one's sensibilities, but rather gives one a sense of justice that an elderly individual could use the system to fight back.

This case is not the proper case for the Court to address the issue raised by the petition for Writ of Certiorari. The Court already has a case pending before it that will address the issue raised by the Petitioner. *TXO Production Corp. v. Alliance Resources Corp., et al.*, No. 92-179, October Term, 1992. That case involves a much greater discrepancy between actual and punitive damages. There is no need for this Court to also review this case.

III.

THE PAYMENT BY NATIONAL STATES OF THE JUDGMENT TO A PARTY THAT CANNOT REPAY IT HAS MADE THIS MATTER MOOT.

On March 3, 1993, National States chose to pay the judgment in full after being denied a stay by the Iowa Supreme Court. National States made no effort to obtain a stay from this Court. The payment to Ida Nassen has made this matter moot since she is

unable to repay the judgment and a substantial portion of the money will be spent prior to a decision by this Court.

Normally, payment of a money judgment does not moot an appeal since repayment can be enforced. *Marin v. England*, 385 U.S. 99, 100-101 (1966). In this case, however, payment has been made to a 90-year old woman who is in a nursing home previously being paid for by Title XIX. As result of the payment of the judgment, Ida Nassen no longer qualifies for Title XIX. Mrs. Nassen will be required to use the money paid to her by National States to pay for her nursing home care during the pendency of this matter. There is no way National States can recover the money spent in light of Ida Nassen's age and financial circumstances. Thus, this matter should be considered moot as a result of National State's payment of the judgment. *Heitmuller v. Stokes*, 256 U.S. 360, 361-62 (1920).

CONCLUSION

For the reasons set forth above, Respondent, Ida Nassen, respectfully requests this Court to deny National States' Petition for Writ of Certiorari.

Respectfully submitted,

BARRY J. NADLER
Counsel of Record
NEWBROUGH, JOHNSTON,
BREWER, MADDUX & NADLER
Attorneys for Respondent
612 Kellogg Avenue, P.O. Box 847
Ames, Iowa 50010
(515) 232-1761

APPENDIX A — RELEVANT PORTIONS OF PETITIONER'S MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT AND MOTION FOR NEW TRIAL

IN THE IOWA DISTRICT COURT

IN AND FOR STORY COUNTY

CAUSE NO. 33838-0789

IDA NASSEN,

Plaintiff,

vs.

NATIONAL STATES INSURANCE COMPANY,

Defendant.

MOTION FOR JUDGMENT NOTWITHSTAND VERDICT AND MOTION FOR NEW TRIAL AND REQUEST FOR HEARING

COMES NOW, the above-named Defendant and states to the Court:

JUDGMENT NOTWITHSTANDING THE VERDICT

* * *

FRAUDULENT MISREPRESENTATION

1. At the close of Plaintiff's evidence and again at the close of all the evidence, Defendant moved for a directed verdict with

respect to Plaintiff's claim of fraudulent misrepresentation and the claim of punitive damages thereunder.

2. That upon the trial the jury returned a verdict in favor of the Plaintiff in the amount of $40,000.00, plus a punitive damage award of $500,000.00.

3. That the Court should have sustained Defendant's Motion for Directed Verdict.

4. That the Court should now direct a judgment notwithstanding the verdict in favor of the Defendant with respect to Plaintiff's count of misrepresentation, including punitive damages for the following reasons:

a. There is no clear, convincing and satisfactory evidence that the Defendant or any of its representatives made any representations to the Plaintiff that at the time said representations were made were false, nor that the Defendant knew they were false, nor that any representations were made in reckless disregard of the truth.

b. All that the evidence does show is that Plaintiff made application for a nursing home policy, that her application was approved, and that the policy was duly issued. The evidence further shows that a subsequent claim was made on the policy, and that the company denied the claim and rescinded the policy.

c. That the representations made in the policy (Exhibit #9) and in the sales brochure (Exhibit #11) were true and correct and not false, and no showing has been made by the requisite proof that these representations were false in any way.

Appendix A

d. There is no showing by the requisite proof in this record that the Plaintiff acted in reliance on the truth of any representations made.

e. That plaintiff wholly failed to produce any proof showing any monetary or actual damage to herself growing from any alleged misrepresentation, other than the benefits of the insurance policy itself.

f. That Plaintiff fully failed to show by the requisite burden of proof that any fraud was perpetrated upon the Plaintiff, or that Plaintiff was entitled to have the issue of punitive damages submitted to the jury as part of her fraudulent misrepresentation count.

g. That the evidence produced over objection relative to Defendant's underwriting policies, claims handling policies, and financial structure was never connected up to show any fraud on the part of the Defendant towards the Plaintiff, especially as it relates to any representations made. That such evidence went to general practices of the Defendant and was not in any way directed toward the Plaintiff, and there was not adequate showing to make a connection between said practices and the allegation of fraud.

* * *

BAD FAITH

* * *

5. That with respect to the award to punitive damages, there is not an adequate showing of actual or legal malice on the part of the Defendant, but the evidence rises only to the level of negligence as

it relates to Defendant's delay in making a decision on Plaintiff's claim. That any other conduct of Defendant was not directed specifically at the Plaintiff as is indicated in Special Verdict No. 9.

7. That the Court erred in allowing the testimony of the expert insurance witness, Marshall Reavis, in that said testimony was not directed toward Plaintiff or connected with Plaintiff, except in a very general way in that she was a policyholder. That said testimony and the foundational testimony relative to Defendant's underwriting practices, claim handling practices and financial structure is irrelevant to the claim and decision with respect to the Plaintiff, and is unduly prejudicial to the Defendant and does not allow the Defendant to receive a fair trial.

8. That the gross excessiveness of the punitive damage award appears to have been influenced by the passion or prejudice of the jury. That the punitive damages verdict is not sustained by sufficient evidence and is contrary to law.

9. That the evidence goes at best to alleged unfair practices on behalf of the Defendant as those are outlined under Chapter 507B.4(9) of *The Iowa Code*, and do not give rise to private claims by individual policyholders.

10. That the Court in failing to define legal malice, actual malice and negligence as requested by Defendant in Defendant's Requested Jury Instruction No. 9, commited error and did not adequately apprise the jury of the law as it relates to the awarding of punitive damages. That the Instruction as given was inadequate and allowed the jury to in effect use a lesser standard for the awarding of punitive damages.

* * *

Appendix A

FRAUDULENT REPRESENTATION

* * *

5. The punitive damage award is excessive, contrary to law and the result of passion and prejudice on the part of the jury.

6. For the reasons set forth in Defendant's Motion for Judgment Notwithstanding the Verdict on the issue of fraudulent misrepresentations, and for those reasons set forth in paragraphs 7, 8, 9, and 10 of Defendant's Motion for New Trial in relation to bad faith which are incorporated here and made a part hereof, an award of punitive damages under Plaintiff's count dealing with fraudulent misrepresentation is not supported by sufficient evidence and is contrary to law.

* * *

APPENDIX B — RELEVANT PORTIONS OF PETITIONER'S IOWA SUPREME COURT BRIEF IN WHICH PUNITIVE DAMAGES ARE DISCUSSED

91-880

IDA NASSEN,

Plaintiff-Appellee,

vs.

NATIONAL STATES INSURANCE COMPANY,

Defendant-Appellant.

APPELLANT'S BRIEF
AND
REQUEST FOR ORAL ARGUMENT

III

THE JURY INSTRUCTION NUMBER 27 WITH REFERENCE TO PUNITIVE DAMAGES WAS INCOMPLETE

In regard to objection to jury instructions, the Court reviews for errors at law. Rule 4, I.R.A.P.; *Meck v. Iowa Power and Light,* 469 N.W. 2d 274 (Iowa App. 1991).

Defendant submitted a proposed jury instruction (A. 473-474) which modified the uniform jury instruction regarding punitive damages. The Trial Court submitted the uniform instruction and defendant's counsel objected (A. 467-468). The proposed instruction read as follows:

Appendix B

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 9

The Plaintiff also claims that punitive damages should be awarded on her claims of bad faith and fraudulent misrepresentation. Before punitive damages may be awarded, the Plaintiff must prove by a preponderance of clear, convincing and satisfactory evidence that the Defendant acted with actual or legal malice, *rather than mere negligence,* toward Plaintiff. Legal malice is established by acts committed by and continued with a willful or reckless disregard for the rights of another. In addition, the Defendant's conduct must cause actual damage to Plaintiff.

The term, "negligence", means failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. Negligence is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

Punitive damages are not intended to compensate for injury, but are allowed to punish and discourage a defendant and others from like conduct in the future.

There is no exact rule to determine the amount of punitive damages, you may consider all of the evidence, including:

1. The nature of Defendant's conduct;

Appendix B

> 2. The amount of punitive damages which will punish and discourage like conduct by the Defendant in view of its financial condition;
>
> 3. Plaintiff's actual damages. (emphasis added)

The Court in instructing the jury relative to punitive damage failed to make clear the distinction between malice and negligence. Instruction No. 27, as given, uses the language of the definition of malice, but does not contrast that type of conduct with that of negligence nor define negligence. The Iowa Supreme Court has made the following statement regarding the malice requirement for punitive damages:

> "Actual malice is shown by such things as personal spite, hatred or ill-will. Legal malice is established by showing wrongful conduct committed with a willful or reckless disregard for the rights of another. *More than mere negligence must be shown.* (Emphasis added).

Mills v. Guthrie Rural Electric, 454 N.W. 2d 846 (Iowa 1990). Citing *Barnhouse v. Hawkeye State Bank,* 406 N.W. 2d 181 (Iowa 1987).

The negligence reference and definition was critical to a proper determination of damages in this case. The Plaintiff made much about the delay in the processing of Plaintiff's claim. Anyone hearing that evidence would find the situation frustrating and irritating. However, the jury needed a guidepost from the Court to distinguish between negligent conduct and that conduct which is the product of malice and subject to punitive damages. Without the instruction, the jury would be unable to make the distinction.

Appendix B

Assuming that the statement "more than mere negligence must be shown" should have been included within the punitive damage instruction, the term "negligence" should have been defined. A term which has a definite legal meaning must be properly defined in the jury instructions. *Kirk v. Marshall,* 247 S.W.2d 454, 455-456 (Texas 1952); *St. Louis Southwestern Railway Co. of Texas v. Jones,* 138 S.W.2d 577, 578 (Texas 1940). The term negligence is such a term which requires a proper definition. *Reilly v. Buster,* 82 S.W.2d 931, 932 (Texas 1935); *St. Louis Southwestern Railway Co. of Texas v. Jones, Id.* at 578.

For the above described reasons, Defendant submits that its instruction regarding punitive damage should have been inserted instead of the one submitted by the Trial Court.

C. THE AWARD OF PUNITIVE DAMAGES WAS EXCESSIVE

In addition to the discussion above, this Court has stated that the amount of exemplary damages is peculiarly within the discretion of the trier of fact. *Grefe v. Ross,* 231 N.W.2d 863 (Iowa 1975). However, exemplary damages must generally be proportionate to the actual damages shown. *Pringle Tax Service, Inc. v. Knoblauch,* 282 N.W.2d 151 (Iowa 1979). However, there is no set mathematical ratio between actual damages and exemplary damages, *Northrup v. Miles Homes, Inc. of Iowa,* supra, 204 N.W.2d 850 (Iowa 1973).

In one of the well known bad faith cases, the California Supreme Court, en banc, held that an award of punitive damages of $5,000,000 was excessive. *Egan v. Mutual of Omaha Ins. Co.,* 620 P.2d 141 (Cal. 1979). They reasoned that the award amounted to two and one-half months (20%) of Mutual's entire net income in 1973 and more than seven months (60%) of such income in 1975. *Id.* at 149.

Appendix B

In this case the contractual damages were $43,800. The punitive damages were eleven times that amount and five times the total actual damages. More importantly, the award was 45% of the company's net income in 1989 (A. 346) and 60% of the company's net income in 1990. (A. 546-549). Given the theory of the plaintiff and her expert that the company would be bankrupt within two years (A. 360), this award will only hasten the company's demise. For these reasons, the punitive damage award was clearly excessive.

* * *